Supreme Court, U.S.
FILED

091172 MAR 26 2010

OFFICE OF THE CLERK

No. 09-

IN THE

# Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
*Petitioner,*

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER*
DONALD J. SIMON
ARTHUR LAZARUS, JR.
PENG WU
SONOSKY CHAMBERS
SACHSE ENDRESON &
PERRY, LLP
1425 K Street, N.W.
Washington, D.C. 20005
(202) 682-0240
Lloyd@sonosky.net

*Counsel for Petitioner*

* Counsel of Record

March 26, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

Whether, contrary to the decisions of three other Circuits and this Court's precedents, the Federal Circuit erred in holding that the filing of a class action against the government does not toll the deadline for asserted class members to exhaust their administrative remedies.

## CORPORATE DISCLOSURE STATEMENT

Arctic Slope Native Association, LTD. is a not for profit corporation organized under the laws of the State of Alaska, and controlled by the governing bodies of the Native Village of Atqasuk, the Native Village of Anaktuvuk Pass (Naqsragmiut), the Native Village of Barrow Inupiat Traditional Government, the Kaktovik Tribal Council, the Native Village of Nuiqsut, the Native Village of Point Hope, the Native Village of Point Lay, and the Village of Wainwright.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISION INVOLVED | 2 |
| INTRODUCTION | 2 |
| STATEMENT | 3 |
| REASONS FOR GRANTING THE PETITION | 8 |
| I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF EVERY CIRCUIT TO HAVE ADDRESSED THE ISSUE | 8 |
| II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT | 10 |
| III. THE DECISION BELOW IS WRONG, WILL NEEDLESSLY MULTIPLY LITIGATION, AND ATTRIBUTES TO CONGRESS AN IRRATIONAL INTENT | 12 |
| CONCLUSION | 15 |
| APPENDICES | |
| APPENDIX A: *Arctic Slope Native Ass'n, Ltd.* v. *Kathleen Sebelius, Sec'y of Health & Human Servs.*, 583 F.3d 785 (Fed. Cir. 2009) | 1a |
| APPENDIX B: *Arctic Slope Native Ass'n, Ltd.* v. *Dep't of Health & Human Servs.*, 08-2 B.C.A. (CCH) ¶ 33,923 (2008) | 27a |

TABLE OF CONTENTS—continued

Page

APPENDIX C: *Arctic Slope Native Ass'n, Ltd.* v. *Kathleen Sebelius, Sec'y of Health & Human Servs.*, No. 2008-1532 (Fed. Cir. Mar. 10, 2010) ..... 41a

APPENDIX D: Federal Statutes (excerpts) ..... 43a

TABLE OF AUTHORITIES

CASES Page

*Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) ..... 9
*American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974) ..... 3, 10, 11, 13
*Andrews* v. *Orr*, 851 F.2d 146 (6th Cir. 1988) ..... 2, 8
*Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) ..... 14
*Califano* v. *Yamasaki*, 442 U.S. 682 (1979) ..... 3, 6, 10, 13
*Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) ..... 4, 5
*Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983) ..... 2, 6, 10, 11
*Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) ..... 3, 10
*Franconia Assocs.* v. *United States*, 536 U.S. 129 (2002) ..... 3, 11
*Griffin* v. *Singletary*, 17 F.3d 356 (11th Cir. 1994) ..... 2, 8, 9
*Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89 (1990) ..... 3, 11, 13
*Lunsford* v. *United States*, 570 F.2d 221 (8th Cir. 1977) ..... 10
*Mathews* v. *Eldridge*, 424 U.S. 319 (1976) ... 10
*Mazurek* v. *Armstrong*, 520 U.S. 968 (1997) ..... 13
*McDonald* v. *Sec'y of Health & Human Servs.*, 834 F.2d 1085 (1st Cir. 1987) ..... 2, 8, 9, 11
*Pueblo of Zuni* v. *United States*, No. 01-1046 (D.N.M. filed Sept. 10, 2001) ..... 3
*Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999) ..... 4

TABLE OF AUTHORITIES—continued


| | Page |
|---|---|
| *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997) | 4 |
| *Ramah Navajo Chapter* v. *Lujan*, No. 90-0957 (D.N.M. filed Oct. 4, 1990) | 3 |
| *Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002) | 4 |
| *Stone Container Corp.* v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000) | 6 |
| *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) | 9 |
| **STATUTES** | |
| 25 U.S.C. §§ 450-450n | 3 |
| § 450j-1 | 4 |
| 28 U.S.C. §§ 2671-2680 | 10 |
| 41 U.S.C. §§ 601-613 | 3 |
| § 605 | 2 |
| **SCHOLARLY AUTHORITY** | |
| Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) | 14 |

IN THE

# Supreme Court of the United States

No. 09-

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
*Petitioner,*

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Arctic Slope Native Association ("ASNA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The Federal Circuit opinion (Pet. App. 1a-26a) is reported at 583 F.3d 785. The Federal Circuit's Order denying ASNA's combined petition for rehearing and rehearing en banc (Pet. App. 41a-42a) is unreported. The opinion of the Civilian Board of Contract Appeals (Pet. App. 27a-40a) is reported at 08-2 B.C.A. (CCH) ¶ 33,923.

## JURISDICTION

The court of appeals entered judgment on September 29, 2009. Pet. App. 2a. The court of appeals denied ASNA's combined petition for panel rehearing and rehearing en banc on March 10, 2010. Pet. App. 42a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 605 of Title 41 of the United States Code provides:

> Decision by Contracting Officer.
>
> (a) Contractor claims
>
> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. * * * Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim. * * * .

## INTRODUCTION

Sharply breaking from the law of three other Circuits, the Federal Circuit ruled that the filing of a class action against the government does not toll the deadline for asserted class members to exhaust their administrative remedies. *Compare* Pet. App. 12a-22a, *with Griffin* v. *Singletary*, 17 F.3d 356, 360-61 (11th Cir. 1994), *Andrews* v. *Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988), *and McDonald* v. *Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1091 (1st Cir. 1987). In creating this inter-circuit conflict, the Federal Circuit failed to honor (1) this Court's trilogy of cases holding that class action tolling extends to "'all asserted members'" of a proposed class, *see Crown,*

*Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 353-54 (1983); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974); and *American Pipe & Const. Co.* v. *Utah*, 414 U.S. 538, 554 (1974), (2) this Court's decisions holding that class action litigation and mandatory class action tolling are generally available against the government on the same basis as they are against private litigants, *see Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 & n.3 (1990); *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979), and (3) the well-established axiom that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties," as "'a realistic assessment of legislative intent.'" *Franconia Assocs.* v. *United States*, 536 U.S. 129, 145 (2002). For these reasons, and because the Federal Circuit's decision would needlessly create burdensome, duplicative litigation, immediate review is warranted.

## STATEMENT

1. In 1990 and 2001 two parallel class action lawsuits under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA), were commenced in New Mexico district court on behalf of tribal organizations that had contracted with two agencies of the federal government under the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450-450n. *Ramah Navajo Chapter* v. *Lujan*, No. 90-0957 (D.N.M. filed Oct. 4, 1990); *Pueblo of Zuni* v. *United States*, No. 01-1046 (D.N.M. filed Sept. 10, 2001). Petitioner ASNA was an asserted member of both classes.

The 1990 *Ramah* lawsuit was filed against the Bureau of Indian Affairs (BIA) challenging the BIA's failure to pay "contract support costs" (CSCs) to tribal

contractors under the BIA's contracts, *see* 25 U.S.C. § 450j-1(a)(2), (g), the same type of contract costs this Court addressed in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). In 1993, the district court certified a class of "all Indian tribes and organizations who have contracted with the Secretary of the Interior under the [ISDA]," including Petitioner. J.A. 496. In so doing, the district court specifically ruled that "it is not necessary that each member of the proposed class exhaust its administrative remedies under the [CDA]" pursuant to 41 U.S.C. § 605(a) in order to be included in the class. J.A. 495. After a 1997 Tenth Circuit opinion on liability, two settlements with the class were approved totaling over $105 million. *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091, 1109 (D.N.M. 1999) ($76 million partial settlement); *Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303, 1317 (D.N.M. 2002) ($29 million partial settlement). Petitioner ASNA participated in both *Ramah* class settlements. *Ramah*, No. 90-0957 (Feb. 15, 2001) (unnumbered docket entry naming ASNA).

The 2001 *Zuni* lawsuit was filed against the Indian Health Service (IHS) for IHS's failure to pay CSCs to tribal contractors. As in *Ramah*, Petitioner was an asserted member of the *Zuni* class. J.A. 477 ("'all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present'"). But unlike *Ramah*, class certification in *Zuni* ultimately was denied. Pet. App. 5a-6a. Thus, the asserted members of the *Zuni* class must now proceed through individual actions to adjudicate their claims against IHS.

This case arises from one such individual action, and concerns ASNA's 1996, 1997 and 1998 contracts

with IHS. ASNA alleges that as to each contract the Secretary failed to pay in full certain CSCs. This Court in *Cherokee Nation* held the government liable under standard government contract and appropriations law for failing to pay full CSCs to similarly situated contractors in two of the same contract years at issue here. 543 U.S. at 647.

2. In September 2005, while the class certification motion in *Zuni* was still pending, ASNA presented three claims to an IHS contracting officer covering the agency's 1996-1998 underpayments. J.A. 20-23, 25-28, 30-33. After the claims were deemed denied by inaction, the Civilian Board of Contract Appeals dismissed ASNA's ensuing appeals, concluding that under § 605(a) of the CDA the claims had been presented more than six years after they had accrued, and were thus outside § 605(a)'s six-year presentment limitations period. Pet. App. 36a-37a. ASNA claimed that the limitations period had been tolled by ASNA's inclusion in the asserted Zuni class, as well as on equitable grounds, but the Board rejected all tolling arguments. According to the Board, the six-year limitations provision in 25 U.S.C. § 605(a) was "jurisdiction[al]" and thus could not be tolled. Pet. App. 36a-37a.

3. The Federal Circuit affirmed in part and reversed in part. With respect to equitable tolling, the court of appeals held that the "'rebuttable presumption of equitable tolling'" applicable in suits against the United States applies to § 605(a). Pet. App. 22a (quoting *Irwin*, 498 U.S. at 95-96). Thus, on remand, the Board would have limited discretion to toll the limitations period on equitable grounds.

But the court reached a different conclusion with respect to mandatory class action tolling. The court of appeals recognized that, under Rule 23 of the

Federal Rules of Civil Procedure, a class action lawsuit automatically and categorically suspends the applicable statute of limitations as to "'*all* asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" Pet. App. 9a (quoting *American Pipe*, 414 U.S. at 554) (emphasis added). The court of appeals also cited *Crown*, where this Court explained that Rule 23 tolling applies not only to intervenors (the situation in *American Pipe*), but also to putative class members who institute their own suits after a court declines to certify the proposed class and the untolled limitations period expires. (In *Crown* the Court three times quoted *American Pipe*'s "all asserted members" language, *e.g.*, *Crown*, 462 U.S. at 349, 350, 353 adding "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Id.* at 353-54.)

The court of appeals acknowledged both the tolling doctrine and the Federal Circuit's recognition in *Stone Container Corp.* v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000), that class action tolling under *American Pipe* and *Crown* applies as a matter of law in litigation against the government. Pet. App. 9a-10a; *see Stone Container*, 229 F.3d at 1354 ("Because '[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect,' 28 U.S.C. § 2072(b), the Federal Rules of Civil Procedure, like the Federal Rules of Criminal Procedure, are 'as binding as any federal statute.' *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988)."). *See also Califano*, 442 U.S. at 700 (since the Federal Rules of Civil Procedure "'govern the procedure in the United States district courts in *all* suits of a civil nature,'"

the Rule 23 class action rule applies to all government litigation "[i]n the absence of a direct expression by Congress" of a contrary intent).

As a result, the court of appeals determined that class action tolling does apply to § 605(a)'s six-year presentment requirement. Pet. App. 10a-12a. Indeed, based upon *Stone Container* the court *rejected* the government's argument that § 605(a) "is a 'jurisdictional statute [that is] not subject to judge-made class action tolling.'" Pet. App. 10a. The Court explained "[t]he case for statutory class action tolling is even stronger here than in *Stone Container* because tolling in this case is required by Rule 23." Pet. App. 11a; *see also id.* ("There is thus no need for section 605(a) to incorporate Rule 23 in order for Rule 23 to have binding legal effect.").

Nonetheless, after holding that mandatory class action tolling applies to § 605(a) in principle, the court of appeals concluded that such tolling does not apply to § 605(a) in practice. The reason the court gave is that § 605(a) imposes an exhaustion requirement and timely exhaustion is "jurisdiction[al]." Pet. App. 13a. Although exhaustion did not pose a barrier to discretionary equitable tolling, it precluded mandatory class tolling. This is so, the court said, because timely presentment "is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA." *Id.*

Because this decision conflicts with the holdings of three circuit courts and the precedents of this Court, ASNA petitioned for en banc review. The petition was denied.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF EVERY CIRCUIT TO HAVE ADDRESSED THE ISSUE.

In holding that Rule 23 does not toll the time to pursue the administrative exhaustion process that precedes most government litigation, the Federal Circuit acted contrary to the decisions of the First, Sixth and Eleventh Circuits. In recognizing class action tolling, the Eleventh Circuit reasoned that "'[a]pplying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the EEOC.'" *Griffin* v. *Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (quoting *Sharpe* v. *Am. Express Co.*, 689 F. Supp. 294, 300 (S.D.N.Y. 1988)).

The First and Sixth Circuits reached the same conclusion. *Andrews* v. *Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988) ("we agree with the district court that the thirty day limitations period for filing individual administrative complaints was tolled during the pendency of the earlier class actions"); *McDonald* v. *Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1091-92 (1st Cir. 1987) (to same effect, concluding that under *American Pipe* and *Crown*, class members facing administrative limitations periods under the Social Security Act "go forward from the point where they had left off during pendency of the class action"); *see also id.* at 1092 ("While this case differs from *Crown Cork & Seal* and *American Pipe* in that the 60-day limitations periods pertained to administrative exhaustion, the principles discussed therein are generally applicable."). In fact, *no* court, other than

the panel below, has concluded that class action tolling does not apply to administrative exhaustion.

The Federal Circuit's attempt to distinguish the contrary First, Sixth and Eleventh Circuit cases is unavailing. According to the Federal Circuit, all of those cases were "predicated on" a footnote in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975), and thus are confined to Title VII litigation. Pet. App. 14a-15a. This is not true. For one thing, none of the other Circuits' cases even *cites Albemarle* (which, incidentally, never mentions tolling), much less is "predicated" upon it. And none of the other Circuit cases even remotely suggests that its tolling analysis or conclusion is unique to the Title VII context. Indeed, *McDonald* did not even involve Title VII claims; it concerned disability claims under 42 U.S.C. §§ 423(a)(1)(D) and 1382(a) of the Social Security Act. 834 F.2d at 1087.

The First, Sixth and Eleventh Circuits' decisions are all based upon the same broad, pragmatic concerns that informed this Court's interpretation of Rule 23 in *American Pipe* and *Crown*. Most notably, the availability of class action tolling "discourage[s] putative class members from needlessly multiplying actions without prejudicing defendants." *Griffin*, 17 F.3d at 361. By eliminating the need for each and every class member to file a separate action, class action tolling reduces the burden on parties, courts, and government agencies alike. Because the Federal Circuit's decision is in direct conflict with these holdings, certiorari is warranted.[1]

---

[1] The Federal Circuit's opinion relies on a different line of cases, but those cases, unlike *Griffin*, *Andrews* and *McDonald*, did not involve tolling issues. In *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975), for example, this Court held that judicial review

## II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

This Court made abundantly clear in *American Pipe*, *Crown* and *Eisen* that Rule 23 tolls the time for asserted members of a proposed class to take *any* action in pursuit of their individual claims pending disposition of the class certification motion. "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554. "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown*, 462 U.S. at 354; *see also Eisen*, 417 U.S. at 176 n.13 (because "commencement of a class action tolls the applicable statute of limitations as to all members of the class," it also applies to members of a certified class who later opt-out).

---

could not be had for class members who had failed to file claims and thus had received no decision from which review could be taken, but never discussed tolling the time to file such claims. In *Califano*, 442 U.S. at 703-04, this Court noted that a class definition would be too broad if it included members who had never sought a waiver or reconsideration of the Secretary's recoupment actions, but again never discussed tolling the time to take such actions. In *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976), this Court held that the presentation of a benefits claim was not waivable in advance of a judicial review action, but again never discussed tolling the time to present. And in *Lunsford* v. *United States*, 570 F.2d 221 (8th Cir. 1977), the Eighth Circuit held that administrative exhaustion under the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) "cannot be waived," 570 F.2d at 224, and that administrative claims cannot be filed on a class basis, *id.* at 225, but never said a word about tolling the time to present such claims.

The rules are no different when the litigation is against the government. *See supra* at 6-7. Indeed, this Court in *Irwin* specifically held that Rule 23 tolling applies in government litigation to protect purported class members who are named in a "defective pleading during the statutory period," 498 U.S. at 96. *Irwin* cited *American Pipe* as one example where "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members." *Id.* at 96 n.3. Thus, under this Court's decisions, Rule 23 class action tolling applies against the government to protect "*all* asserted members" of an unsuccessful (or "defective") class action. *American Pipe*, 414 U.S. at 554 (emphasis added). *See also Franconia*, 536 U.S. at 145 (addressing limitations principles generally).

"All" means "all;" it does not mean "some." As in *Crown*, it does not mean just "intervenors," 462 U.S. at 350, and it does not mean just putative members who received right-to-sue letters before the class action was filed. *Id.* at 354. And, contrary to the Federal Circuit's view of the word, "all" does not mean just those putative class members who presented administrative claims before the class action was filed. *See also McDonald*, 834 F.2d at 1091 (tolling applies to asserted members of "even a meritless class action").

The court of appeals recognized that § 605(a)'s exhaustion requirement was not actually "'jurisdictional,'" Pet. App. 10a, 12a, but nonetheless denied tolling on the rationale that the district court in *Zuni* could not exercise jurisdiction over claims that had not yet been presented. But the issue is not whether the district court had jurisdiction over claimants who had not yet exhausted their claims, any more than it is ever the question in class action litigation whether

a district court has jurisdiction over the asserted absent class members of an as-yet uncertified class. Rather, the proper question—regardless of whether the class members will ultimately be a part of the class, or whether a class will even be certified—is whether Rule 23 tolls the time for those asserted class members to take individual action in pursuit of their individual claims while the district court decides how to proceed. The Federal Circuit's failure to make this distinction, with immediate implications for all former *Zuni* claimants and long-term implications for all class litigation against the government, warrants immediate review.

## III. THE DECISION BELOW IS WRONG, WILL NEEDLESSLY MULTIPLY LITIGATION, AND ATTRIBUTES TO CONGRESS AN IRRATIONAL INTENT.

The Federal Circuit's application of the *American Pipe* rule is fatally flawed. Specifically, in determining whether Petitioner would have been a party "'had the [*Zuni*] suit been permitted to continue as a class action,'" Pet. App. 9a, the court did not consider the "class" as defined in the Complaint—which on its face included ASNA—but instead redefined the class long after the litigation commenced to *exclude* ASNA. That retroactive analysis is wrong, unduly burdensome, and illogical. It is wrong because, until a court rules otherwise on the class certification motion, the putative class is defined by the Complaint and, as an asserted member of that class, ASNA and every other asserted class member are entitled to the benefit of tolling.

It also fosters unnecessary litigation and uncertainty, and is thus burdensome and inefficient. Worse yet, to the extent it applies to administrative exhaustion, it severely narrows the availability of

class action tolling in litigation against the government, contrary to this Court's decision in *Califano*. Since most suits against the government require some sort of administrative exhaustion, excepting exhaustion from the tolling rule effectively compels all asserted class members in government litigation to take individual protective actions to exhaust their administrative remedies—even after a class action complaint is filed—defeating the very purpose of Rule 23.

Moreover, there is no logic to the Federal Circuit's holding that a so-called "jurisdictional" exhaustion requirement must give way to discretionary judge-made equitable tolling, but not to mandatory class action tolling. All tolling—both discretionary and mandatory—is a question of legislative intent. *See Irwin*, 498 U.S. at 95 ("a realistic assessment of legislative intent"); *American Pipe*, 414 U.S. at 557-58 ("consonant with the legislative scheme"). And it simply makes no sense to conclude that Congress would intend to permit *ad hoc* equitable tolling but not sensible and predictable class action tolling. Certainly there is nothing to suggest that Congress had such an internally inconsistent intent when it added the six-year presentment rule to the Contract Disputes Act. Indeed, the controlling presumption in favor of Rule 23 tolling is quite to the contrary in the absence of "the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Califano*, 442 U.S. at 700.

Finally, the Federal Circuit's decision to remand this case for application of equitable tolling is no reason to delay review. As this Court has made clear, "there is no absolute bar to review of nonfinal judgments." *Mazurek* v. *Armstrong*, 520 U.S. 968,

975-76 (1997) (per curiam); *see, e.g.*, *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003) (reviewing court of appeals' order affirming denial of motion to remand case to state court). This Court has intervened "particularly [when] the lower court's decision is patently incorrect" and the decision "will have immediate consequences for the petitioner." Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007). Both of those conditions are met here. The Federal Circuit's decision cannot be squared with this Court's decisions or the decisions of three other circuits. *See supra* at 8-12; *cf. Breuer*, 538 U.S. at 694 (reviewing nonfinal order to resolve circuit split). And the fundamental error in the court of appeals' analysis—permitting only equitable tolling and not class action tolling—will have "immediate consequences" by requiring burdensome, time-consuming, case-by-case, fact-intensive litigation on an individual claimant's particular claim to discretionary tolling. That burden falls not just on Petitioner ASNA, but on every single tribe that is owed CSCs under this Court's decision in *Cherokee*. The Federal Circuit's legal error is plain, the circuit split is clear, and this Court's review is therefore necessary.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER*
DONALD J. SIMON
ARTHUR LAZARUS, JR.
PENG WU
SONOSKY CHAMBERS
SACHSE ENDRESON &
PERRY, LLP
1425 K Street, N.W.
Washington, D.C. 20005
(202) 682-0240
Lloyd@sonosky.net

*Counsel for Petitioner*

* Counsel of Record

March 26, 2010